

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Brian James Filter

Debtor.

C/A No. 99-04462-W

JUDGMENT

Chapter 7

FILED
2000 OCT 16 PM 4:17
U.S. BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

ENTERED

OCT 17 2000

S. R. P.

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Court approves the Application for Approval of Employment of Attorney on Contingency Fee Basis and authorizes the employment of W. Ryan Hovis as attorney for the estate for the services described in the Application and on a contingency fee basis according to the terms of the Application as conditioned by the terms of the attached Order.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
October 16, 2000.

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CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

✓ ✓ OCT 17 2000 ✓ (RH)
✓ (Goodman)
DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

SHEREE R. PHIPPS

Deputy Clerk

✓ (WOT)

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Brian James Filter

Debtor.

C/A No. 99-04462-W

ORDER

Chapter 7

FILED
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OCT 11 6 2000
BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina 29201

ENTERED

OCT 17 2000

S. R. P.

THIS MATTER comes before the Court upon the Application for Approval of Employment of Attorney on Contingency Fee Basis (the "Application"), filed on September 12, 2000 by the Chapter 7 Trustee, W. Ryan Hovis (the "Trustee"). In the Application, the Trustee seeks the employment of an attorney to perform the following legal services for the estate: (a) pursue possible preference actions to avoid a mortgage executed by Brian James Filter ("Debtor") in his parents' favor and recover the mortgage payments; (b) pursue possible preference actions to recover payments made by Debtor to certain institutional creditors, such as banks and credit card providers; and (c) pursue possible fraudulent transfer actions against the transferee of certain real estate.

The Trustee asserts that employment of himself or his law firm on a contingency fee basis would be in the best interest of the estate. First, the Trustee claims that, due to his familiarity with the facts of the case, he could undertake and manage the litigation more efficiently than if he were to hire another established attorney with competence in bankruptcy law. Second, he asserts that the estate has not collected sufficient assets to ensure payment of a professional employed on an hourly basis. Lastly, the Trustee argues that a contingency fee basis does not risk diminution of estate assets if the litigation proves to be unsuccessful.

The Trustee proposes employment on a contingency fee basis of 25%, plus costs, of any

gross recovery realized by the estate prior to the commencement of a suit; 33 1/3%, plus costs, of any recovery realized by the estate after commencement of a suit, if no appeal is taken; and 50% of any recovery realized if an appeal is necessary to obtain and collect a final judgment from the defendant. Pursuant to the Application, the Trustee further agrees to submit his fee and expense request to the Court for review, pursuant to 11 U.S.C. §330,¹ prior to being paid for the services and agrees that the amount approved may be less than the amount of the contingency fee allowed at the time of employment.

As required by this Court in In re Air South Airlines, Inc., C/A 97-07229-W (Bankr. D.S.C. 5/1/2000), the Application in this case was noticed for twenty days to all creditors in the case and to the United States Trustee (the “UST”), but no objections were filed in response. A hearing on the Application was held before the Court on September 26, 2000, and after considering the facts of this case and arguments of the Trustee at the hearing, the Court makes the following Conclusions of Law.

CONCLUSIONS OF LAW

Section 327(d) provides that a trustee may be authorized to employ himself or herself or his or her law firm to act as an attorney for the estate, if such employment is in the best interest of the estate. Furthermore, the Court may allow employment of professional services on a contingency fee basis, which is an appropriate, and often times prudent, means of obtaining professional assistance in the performance of a trustee’s fiduciary duties. See §328(a)- (b). Ordinarily, the trustee is in the best position to know the needs of the estate and to weigh that against the estate’s resources as well as the potential of litigation. The trustee is also in the best

¹ Further references to the Bankruptcy Code shall be by section number only.

position to select and manage the performance of any attorney employed to assist the estate, much like a client directs the performance of his or her attorney. However, the application by a trustee to employ himself or herself or the respective law firm on a contingency basis could cause an appearance of self-dealing. While such appearance does not per se disqualify a trustee's employment in the case on a contingency fee basis; the Court should scrutinize the application to ensure that the trustee's own employment would indeed be in the best interest of the bankruptcy estate. The Court finds that the appearance and potential for self-dealing can be best addressed by affording all creditors and the UST sufficient notice and an opportunity to object to the application and by conducting, when necessary, a hearing to consider such application.

An attorney employed on a contingency basis inherently assumes a risk of nonpayment depending upon the success of the litigation. In order to balance the expectations of the attorney with the interest of creditors in a bankruptcy case, it is fair to determine the appropriateness of the contingency rate at the employment stage, more so than by way of the hindsight review of the reasonableness of the compensation when payment is requested. Thus, this Court finds that notice to creditors of the application to employ should contain all essential information to allow the parties and the Court to determine that the employment is in the best interest of the estate. More specifically, the notice and application should adequately describe the type and nature of the subject litigation which is contemplated at the time, the amount claimed and potential recovery, and the likelihood of settlement. Furthermore, the identities of the defendants as well as any factors that may affect the difficulty of the litigation and recovery should also be disclosed, as long as such disclosure does not prejudice the litigation.

With this level of scrutiny in mind, the Court recognizes that a request to assign all

litigation to the same attorney or law firm may provide potential attorneys with more incentive to seek such employment, at the lowest charge available to the estate, and to take all related litigation despite the size and likelihood of recovery. Furthermore, the Court acknowledges that assigning all litigation to the same attorney or law firm may also allow for a more efficient management of the litigation by the Trustee.

As to the reasonableness of fees, the Court finds that the current standard contingency fee rates charged in nonbankruptcy settings for collection actions are normally the appropriate starting point in instances where a trustee seeks to employ himself or herself or his or her law firm on a contingency fee basis.² However, because the trustee would not be serving in the traditional role of a client who “shops around” for the best attorney, negotiates the fee, and supervises the attorney’s performance; the Court is inclined to provide some guidelines for approval of such a contingency fee employment arrangement.

In this particular case, the Court also has some concerns with the contingency fees requested in the Application. First, the Court has concerns about compensating the Trustee as his own attorney with 25% of recovery prior to the commencement of litigation. In this Court’s view, the Trustee, in fulfillment of his statutory duty to collect assets, should issue pre-litigation demands in his capacity as trustee. In this District, all of the trustees have the experience and expertise to make such demands without the assistance of legal counsel. At least two written demands for turnover or recovery, including one which may threaten the commencement of

² In order to establish the proper contingency fee rate, the trustee should periodically solicit and evaluate the offering of bids by other competent law firms in this District which may be willing to undertake employment in similar bankruptcy cases on a contingency basis (other than the firms of other trustees under some type of reciprocating relationship). Such a comparison would aid in evaluating the trustee’s proposed contingency rate and may serve to further legitimize it.

litigation within the near future, should be undertaken by the Trustee in that capacity before consideration is given to compensating himself as attorney for the Trustee for any recovery achieved through similar demands or methods. Therefore, the Court is not inclined to allow compensation based on such a contingency rate for pre-litigation demands by the Trustee as his own attorney absent some additional justification.³

Second, the Court finds that a contingency rate of 50% for recovery made after an appeal appears too high in the present case. Thus, the Court is inclined to reduce that rate to 40% for such recovery after appeal to the District Court. However, the Court recognizes that the higher percentage rate may be justified when appeals requiring briefing or oral argument to the Circuit Court of Appeals are anticipated; therefore, the Court would consider approval of a higher contingency rate in that event.

The Court also notes that the manner of computing the contingency fee when recovery is an avoidance of a transfer or an encumbrance on property, as opposed to a recovery by payment, should be based upon the percentage of recovery as measured by the actual benefit to the estate. For example, if the recovery is the avoidance of a \$60,000 mortgage on property with a projected value of \$100,000, and the Trustee sells that property for \$90,000, an attorneys fee of 1/3 would be \$20,000. If the same property sold for only \$30,000, an attorneys fee of 1/3 would be \$10,000; that is, 1/3 of the benefit to the estate. At the hearing, the Trustee indicated his

³ In this case, the litigation seeks recovery under the preference and fraudulent transfer provisions of federal bankruptcy law and related state law. The Court recognizes that litigation in other cases may arise under nonbankruptcy law which requires the trustee to employ attorneys with specialized training and skills from the outset of the case in order to evaluate and handle such litigation, including pre-litigation demands. In such instances, a contingency rate for recoveries made upon pre-litigation demands may be more appropriate.

agreement to this manner of computing the contingency fee.

CONCLUSION

Having considered the circumstances of this case and the representations made by the Trustee at the hearing, the Court finds that the Application of the Trustee in this case meets the requirements of §327(d). It is therefore,

ORDERED that the Trustee is authorized to employ W. Ryan Hovis as attorney for the estate for the services described in the Application and on a contingency fee basis according to the terms of the application as conditioned by the terms of this Order.

IT IS FURTHER ORDERED that, upon the agreement of the Trustee and attorney, the final compensation of the attorney shall be set by the Court and may be different from the amount stated in the application.

AND IT IS SO ORDERED.

Columbia, South Carolina,
October 16, 2000.


UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

✓ ✓ OCT 17 2000 ✓
(Goodwin) (RH)
DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

SHEREE R. PHIPPS

Deputy Clerk

✓
(WST)